Supreme Court, U. S.
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80-934

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

ANTHONY J. BERTUCCI CONSTRUCTION CO., INC.

MACK A. MATHIS, ALOIS LUHR AND LUHR BROS., INC.,

Petitioners

vs.

UNITED STATES OF AMERICA,

Respondent

On Writ of Certiorari to The United States

Court of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW*

1. Upon the trial of an indictment under the mail fraud statute, 18 USC §1341, alleging a single scheme to defraud, wherein there is a substantial evidentiary basis for a jury finding of multiple schemes, must the jury be instructed to consider the issue of multiple schemes.?

2. Upon felony indictment for violation of the Sherman Act, the Mail Fraud Statute, and the False Statements Statute, and the commencement of a companion civil damage antitrust case by and on behalf of the U.S. Government, may U.S. attorneys impede, obstruct, or influence witnesses under color of federal authority for the protection of the Government's civil monetary claim.?

*Petitioners also preserve the issue of the spillover effect of multiple mail fraud counts onto unrelated false statement counts.

LIST OF ALL PARTIES

Parties in the United States Court of Appeals included the United States of America, and defendants Charles L. Rodgers, Anthony J. Bertucci Construction Co., Inc., Mack A. Mathis, Alois Luhr and Luhr Bros. Inc. Charles L. Rodgers is not a party to this petition.

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OPINION BELOW

The decision of the United States Court of Appeals for the Fifth Circuit, affirming the jury verdict, is reported as *United States vs. Rodgers* at 624 F2d 1303 (CA5-1980). A copy of the appellate court's slip opinoin is included at Appendix A.

JURISDICTION

The United States Court of Appeals for the Fifth Circuit rendered on August 27, 1980, its opinion affirming the verdict in the district court.

A petition for rehearing was denied on October 10, 1980, and the notice of denial is included at Appendix B.

Jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Supreme Court Rule 17(a).

STATUTORY PROVISIONS

Statutes involved are:

1. 15 USC 1 - Sherman Act

2. 18 USC 2 - Aiding and Abetting

3. 18 USC 1001 - False Statements

4. 18 USC 1341 - Mail Fraud

5. 18 USC 1503 - Obstruction of Justice

These are attached hereto at Appendix C.

STATEMENT OF THE CASE

1 - JURY CHARGE

This a combined antitrust, mail fraud and false statement indictment against 26 defendants.[1] The indictment alleged a single scheme to defraud the United States Corp of Engineers, by rigging bids to the Corps, confected by numerous contractors and individuals in violation of the mail fraud statute. The scope of the alleged scheme encompassed hundreds of bank stabilization contracts let to 16 companies over a 14 year period in six Corps of Engineer Districts: Omaha, Kansas City, St. Louis, Memphis, Vicksburg, and New Orleans.

Contrary to the "single scheme" theory of the indictment, the testimony of the prosecution witnesses indicated that bid rigging schemes had existed in some of the subject Districts to the exclusion of and unrelated to other Districts; that the schemes included some of the defendants to the exclusion of others, and that each bid rigging scheme stood independent of later schemes in different districts. For example, Petitioner Mathis was supposedly implicated only in an alleged bid rigging scheme in the New Orleans District and the government's evidence excluded him from any implication in other schemes in the Omaha, Kansas City, St. Louis, Memphis and Vicksburg Districts.

[1]The original indictment contained an antitrust charge in Count I, the overt acts of which were subsequent 53 mail fraud and false statement substantive charges. Some of the defendants charged in the antitrust conspiracy charges were not charged in the substantive mail fraud and false statements charges. The antitrust charge was severed from the substantive charges for later trial which has not yet taken place.

The Fifth Circuit Court of Appeals' decision specifically found that ". . . [t]he jury properly could have concluded that the defendants were involved in several and not one scheme to defraud . . ." *United States v. Rodgers, supra* at 8895.

Petitioner sought a jury charge on the issue of "single versus multiple schemes" which was refused by the District Court. While acknowledging that the giving of such an instruction might be the "better practice", the Court of Appeals concluded that, in the Fifth Circuit, failure to give it was not reversible error. *United States v. Rodgers, supra* at 1308.

2 - WITNESS OBSTRUCTION AND INTIMIDATION

Preparation for trial was prevented when access to witnesses was obstructed by the prosecution. The witnesses were civil and military employees of the Corps of Engineers. Their unavailability was dictated by the prosecution for the protection and furtherance of the Federal Government's companion civil antitrust damage case.[2]

These were not witnesses the Government intended to rely on at trial or sought to protect from harm. Rather, these were the witnesses the defendants sought to call upon in preparation and presentation of their defense, but practically could not, because of prosecutorial intimidation.

Specifically, the Corps employees were instructed by U.S. attorneys not to discuss the case with the defendants or their counsel.[3] At the same time the Corps employees were instructed to cooperate completely with the prosecution.[4] Witness interview sessions were totally obstructed

[2]Vol. 22, pp. 12, 23.

[3]Vol. 7, p. 1920; Vol. 8, pp. 2119, 2189, 2236; Vol. 10, p. 2759.

[4]Vol. 7, p. 1920.

and terminated at the insistence of government counsel in the presence of the witnesses.[5] At least ten affidavits were filed recording the obstructions.[6] Multiple motions to dismiss were filed. In open court, the trial court stated:

> "Unfortunately these people, I think, now perceive themselves aligned on one side of the case, and that perception must be destroyed if it is possible to do, to the extent that it is possible for an order to do that. And the perception springs from written and verbal—I don't know what the verbal part is, but I know the written part."[7]

The Court clearly recognized that Antitrust Division counsel were involved.[8] However, the Court denied the motions to dismiss, opting instead to enter an order which would attempt to rectify the *"atrocious"*[9] situation. Subsequently, however, the order was modified and its effect eliminated. In the words of the Court:

> "I can only tell you that was, in effect, an amendment to my earlier order, and I did it verbally, and I did it because it became apparent to me that it was hopeless to expect the Corps to write something . . . I was really exceeding my power.[10]

Witness interview attempts continued to be obstructed.

[5]Vol. 8, pp. 2093, 2124, 2127, 2191

[6]Vol. 7, p. 1920; Vol. 8, pp. 2034, 2040, 2093, 2107, 2110, 2114, 2122, 2124, 2127, 2156, 2191.

[7]Vol. 22, p. 14.

[8]Vol. 22, p. 24.

[9]Vol. 21, p. 3.

[10]Vol. 21, p. 8.

Letters were issued by Government attorneys denying interview requests.[11] By the time limited access was permitted, the intimidation and influence were complete. The trial judge's observations were correct—the witnesses were in fact aligned.

This case presents no factual issue. The witnesses were obstructed and aligned with the prosecution. The Appellate Court recognized the obstruction but disregarded the intimidation. The Fifth Circuit held that obstruction by the prosecution was cured upon the removal of the obstruction.[12]

REASONS RELIED UPON FOR ALLOWANCE OF THE WRIT

1 - JURY CHARGE

The decision of the Court of Appeals for the Fifth Circuit conflicts with decisions of other Circuits.

When a mail fraud scheme involves more than one party, lower courts have applied conspiracy law principles to mail fraud prosecutions.[13] When an indictment charges a single scheme but the proof admits of a finding of multiple schemes, this Court ruled as follows in *Kotteakos v. United States*, 328 U.S. 750 at 776-777:

> ". . . Here, if anywhere . . . extraordinary precaution is required, not only that instructions shall not mislead, but that they shall scrupulously safeguard each defendant individually, as far as possible, from loss of

[11]Vol. 8, p. 2189; Vol. 10, p.2759.

[12]U.S. v. Rodgers.

[13]*United States V. Rodgers, supra*—and all cases cited under "A. Scheme or Schemes", on p. 8894 of slip opinion.

> identity in the mass. Indeed, the instructions often become, in such cases, his principal protection against warranted imputation of guilt from others' conduct. Here also it is of special importance that plain error be not too readily taken to be harmless."

Because of the "agency" concepts inherent in conspiracy law, transference of guilt is a tangible, though legally tolerable, risk of conspiracy prosecutions. However, where the evidence discloses multiple schemes when only one is charged, "[t]he dangers for transference of guilt from one to another across the line separating conspiracies, subconsciously or otherwise, are so great that no one really can say prejudice to substantial rights has not taken place". *Kotteakos v. United States, supra* at 774.

The error condemned in *Kotteakos* was the failure to properly instruct the jury on "single versus multiple" schemes. Despite this Court's adjuration that such an instruction, in multiple party cases, becomes the defendant's "principal protection against unwarranted imputation of guilt from other's conduct, "*Kotteakos, supra* at 776, the Courts of Appeals are divided on the requirement for such instruction.

The Seventh Circuit requires that "when the possibility of a variance appears", the trial court should instruct the jury on multiple conspiracies. *United States v. Varelli,* 407 F2d 735, 746 (7 Cir. 1969). The Ninth Circuit rules that "[i]f it is possible under the evidence for the jury to find that multiple conspiracies existed, then the judge should instruct the jury on the issue." *United States v. Eubanks,* 591 F2d 512, 518 (9 Cir. 1979), accord *United States v. Griffin,* 464 F2d 1352 (9 Cir. 1972); *United States v. Thomas,* 586 F2d 123 (9 Cir. 1978); *United States v.*

Bracy, 566 F2d 649 (9 Cir. 1977). The Second Circuit appears to hold that such an instruction is helpful but not required in a "relatively uncomplicated case." *United States v. Lam Lek Chong,* 544 F2d 58; compare *United States v. Tramunti,* 513 F2d 087 (2 Cir. 1975). The Tenth Circuit appears to consider failure to give the instruction harmless error. *United States v. Watson,* 594 F2d 1330 (10 Cir. 1979), *cert. denied,* 444 U.S. 840. The First Circuit considers giving the instruction a "good practice". *United States v. Levine,* 569 F2d 1175, *cert. denied,* 436 U.S. 928. The Fifth Circuit holds that failure to give the charge is not reversible error. *United States v. Rodgers, supra* at 1308.[14]

The crucial issue in *Kotteakos* was whether the failure to give a proper charge on multiple schemes was "harmless error." The Courts of Appeals have made an uneven and contradictory application of that decision, with at least half of those Courts reinstituting the harmless error rule.

Favored prosecutional tools in business crime cases are conspiracy and mail fraud. To this must be added the recent practice of the Antitrust Division of the Department of Justice of combining anti-trust conspiracy charges with numerous mail fraud substantive charges.

The practice itself affords an opportunity for the transference of guilt from one defendant to another, or from one scheme to another. And failure to properly instruct the jury on "single versus multiple" schemes further enhances the opportunity for the tranference of guilt, resulting in prejudicial error.

Because of the conflicting decisions of the various circuits and the dangerous opportunity for transfer of guilt,

[14]But, see, *United States v. Rodriguez,* 509 F2d 1342 (5 Cir. 1975); *United States v. Perez,* 489 F2d 51 (5 Cir. 1973).

petitioners pray that a writ of certiorari issue to review the judgement and opinion of the U.S. Court of Appeals for the Fifth Circuit in *U.S. v. Rodgers, supra.*

2. THE DECISION BELOW, ALLOWING WITNESS INTIMIDATION, TOTALLY DEPARTS FROM THE ACCEPTED AND USUAL COURSE OF CRIMINAL PROCEEDINGS AND INVITES FUTURE USE OF THE PRACTICE.

Witness obstruction and intimidation raises serious questions in the administration of Federal criminal justice. It is imperative that this Court exercise its supervisory powers and review the decision of the Fifth Circuit for the following reasons.

First: The decision *radically departs from the accepted and usual course of criminal proceedings.* The standard long accepted in criminal justice administration is that a defendant is entitled to prepare a defense unfettered by the prosecution. It is improper to instruct a witness not to talk with defense counsel, and it is equally improper to instruct a witness not to discuss a case with defendants or their counsel unless a lawyer for the prosecution is present. *Gregory v. U.S.*, 369 F2d 185 (D.C. Cir. 1966). The principle is so elemental it has not historically required this Court's supervision to be guaranteed. Now that violation of the principle has been accepted and condoned by the Fifth Circuit, this Court must exercise its supervisory powers to reinstate the most basic element of due process and fair trial.

Second: The decision is *contrary to Congressional intent* as set forth in Title 18, Chapter 73, Obstruction of Justice. Specifically it is contrary to 18 U.S.C. Section 1503 which prohibits influencing, intimidating, or impeding any witness. Were a defendant, or someone acting at his direc-

tion, to intimidate a prospective prosecution witness, the remedy would be rather simple. The prosecution merely undertakes an additional prosecution of the defendant for obstruction of justice. But, conversely, if the prosecution intimidates a prospective defense witness, the defendant may not turn to the prosecution and expect it to prosecute itself. The safeguard against such prosecutorial misconduct is the exercise of this Court's supervisory powers.

Third: The decision *invites future impedence and intimidation of witnesses,* especially in those cases where the Federal Government intends to pursue a civil damage case subequent to a felony prosecution. Prior to the elevation of the Sherman Act to a felony, the riskof this occurrence was nominal. Today, however, the rules and the consequences are materially different.

The acts of federal prosecutors intimidating federal employees so as to affect their state of mind as witnesses in a criminal case should not go unanswered. Presumably, if evidence to be obtained from federal employees is unfavorable to a defendant, then access to such a witness would not be obstructed. Conversely, if prosecutors know of evidence favorable to a defendant, they are under a duty to disclose the information. *Brady v. Maryland,* 373 U.S. 83 (1963). However, evidence favorable to a criminal defense will normally be detrimental to a federal civil monetary claim.

The decision below recognized the obstruction of witnesses. Amazingly, however, the Appellate Court held that the situation was cured by mere removal of the obstruction shortly before trial. Impedence of the witnesses under color of federal authority and in the interest of furthering a federal monetary claim weighs heavily upon those witnesses whose livelihoods, job progressions and retirement benefits hinge upon loyalty to the

Government's case. The practice of witness obstruction clearly defies the basic reasoning of the Obstruction of Justice Statute, 18 U.S.C. Section 1503. Condonement of obstruction by the prosecution invites future prosecutorial obstruction. Under *U.S. v. Rodgers,* now every witness may routinely be obstructed under color of federal authority for whatever benefit it may produce for the prosecution because, once the obstruction is removed, it is as though it never occurred. This tactic subjects the accused to a procedure which is incompatable with the vital but restricted duty of prosecutors for the Government. The obstruction procedure totally undermines the integrity of federal criminal proceedings.

Fourth: The issue is one of *first impression* and under the principles defined in *McNabb v. U.S.,* 318 U.S. 332 (1943), judicial supervision by the Court is required:

> "Judicial supervision of the administration of criminal justice in the federal courts implies the duty of establishing and maintaining civilized standards of procedure and evidence. Such standards are not satisfied merely by observance of those minimal historic safeguards for securing trial by reason which are summarized as 'due process by law' and below which we reach what is really trial by force." *McNabb,* at 340.

* * * *

> "A democratic society, in which respect for the dignity of all men is central, naturally guards against the misuse of the law enforcement process. Zeal in tracking down crime is not in itself an assurance of

> soberness of judgment. Disinterestedness in law enforcement does not alone prevent disregard of cherished liberties. Experience has therefore counseled that safeguards must be provided against the dangers of the overzealous as well as the despotic." *McNabb,* at 343.

McNabb recognized that the end does not justify the means. In *McNabb* methods of obtaining McNabb's confession, which were not specifically prohibited by law, nevertheless stultified a congressional policy enacted into law which required an accused to be brought before the nearest judicial officer.

As in *McNabb,* a Congressional policy has again been stultified. The policy prohibiting Obstruction of Justice (18 U.S.C. Section 1503) was cast aside in favor of protecting the federal monetary claim. It should be pointed out that the witnesses obstructed and intimidated were not those which the prosecution sought to protect from harm or which the prosecution intended to rely upon for their case. Nor were these prosecution witnesses the defendants merely desired to interview. Rather, these were witnesses the defendants wanted to call upon for preparation and presentation of a defense, but practically could not, because of prosecutorial intimidation.

Certainly, a federal monetary claim should not justify the elimination of a defendant's right to prepare a defense. This Court's supervisory powers are now urgently needed to safeguard this right in all cases in which the prosecution performs a dual role. Again, turning to *McNabb*:

> "The history of liberty has largely been the history of observance of procedural safeguards. And the effective administration of criminal justice hardly requires

disregard of fair procedures imposed by law." *McNabb,* at 347.

CONCLUSION

The Petitioners Anthony J. Bertucci Construction Co., Inc., Mack A. Mathis, Alois Luhr and Luhr Bros., Inc. respectfully pray that a writ of certiorari issue to review the judgement and opinion of the United States Court of Appeals for the Fifth Circuit entered on August 27, 1980.

Respectfully submitted:

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 8th day of December, 1980, three copies of the Petition for Writ of Certiorari were mailed, postage prepaid, to the following:

Solicitor General
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Washington, D.C. 20530

Robert Nicholson
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The undersigned further certifies that all parties required to be served have been served.

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APPENDIX "A"
UNITED STATES v. RODGERS

UNITED STATES of America,
Plaintiff-Appellee,

v.

Charles L. RODGERS, Anthony J. Bertucci Construction Co., Inc., Mack A. Mathis, Alois Luhr and Luhr Bros., Inc., Defendants-Appellants.

No. 79-5381.

United States Court of Appeals,
Fifth Circuit.

Aug. 27, 1980.

Appeals from the United States District Court for the Eastern District of Louisiana.

Before THORNBERRY, FRANK M. JOHNSON, Jr., and HENDERSON, Circuit Judges.

FRANK M. JOHNSON, Jr., Circuit Judge:

Defendants Alois Luhr, Mack A. Mathis, Charles Rodgers, Anthony J. Bertucci Construction Company (Bertucci Co.), and Luhr Brothers, Inc. (Luhr Bros.)[1] ap-

[1]At times relevant to the case defendant Luhr served as president of Luhr Bros. and Mathis as president of Bertucci Co., Rodgers was former president of Markham and Brown Co., an indicted defendant that did not go to trial.

peal multiple convictions of mail fraud, 18 U.S.C. §1341,[2] and making false statements to a federal agence, 18 U.S.C. §1001.[3] Appellants' challenge is both vigorous and multipronged. Nevertheless, careful examination of applicable legal authority and of a voluminous record composed of nearly five thousand nine hundred pages convinces us that the contentions of defendants are insufficient to justify our disturbing their convictions. Accordingly, we affirm.

The prosecution arose from a comprehensive investigation conducted by the Antitrust Division of the United States Department of Justice into the practices of the river construction industry of the Mississippi River and its major tributaries. On September 27, 1978, a grand jury of the Eastern District of Louisiana indicted much of that industry—ten individuals and sixteen corporations. The indictment charged one count of conspiracy to restrain com-

[2]Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, . . . for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing,knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.
18 U.S.C. §1341.

[3]Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.
18U.S.C. §1001.

petition in violation of the Sherman Act,[4] twenty-nine counts of mail fraud, and twenty-four counts of false statement.[5] The charges related to an alleged bid-rigging scheme carried out by the industry between 1964 and 1978 for the allocation of river bank stabilization projects[6] awarded by the United States Army Corps of Engineers (Corps).[7]

[4]"'Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is delcared to be illegal. . ." 15 U.S.C. §1.

[5]An aiding and abetting count also accompanied each substantive mail fraud and false statement charge. *See* 18 U.S.C. §2.

[6]Bank stabilization projects involve the construction or repair of structures that help channel the flow of a river to protect the river banks from erosion. These structures include: 1) revetments constructed of stone, piling, or concrete that are usually parallel to the river channel and hold it in a fixed position and thereby protect the bank; 2) dykes that are generally built of rock or some other material and project out into the channel at right angles to the bank. Dykes move the flow of water away from the eroding bank; 3) jetties, which project beyond the bank line at the mouth of a river or stream to keep up the flow of the river so that it reaches deep water; and 4) foreshore protection which usually consists of large pieces of rock spread along the river bank.

[7]Although the conspiracy in restraint of trade and the mail fraud scheme were alleged to have lasted from 1964 to 1978, the specific mail fraud and false statement counts were based on bids submitted by defendants or mailings sent by the Corps of Engineers regarding five bank stabilization projects awarded in 1976 by the New Orleans Corps district: three Emergenc Foreshore Protection jobs, the Southwest Pass job, and the Hadden-Ft. DeRussy job. All defendants were named in Count 1 alleging a conspiracy in restraint of trade. The mail fraud and false statement counts, however, charged various defendants.

The district court severed the Sherman Act count and, on May 14, 1979, the remaining counts came to trial. The jury found each of the defendants who elected to stand trial[8] guilty on all counts charged.[9]

[8]Of the twenty-six individual and corporations indicted, nineteen entered pleas of guilty or *nolo contendere.*

[9]W. Kent Ford and Ford Construction Company were convicted of ten counts of mail fraud relating to the First (Counts 2—4), Second (Counts 5—8), and Third (Counts 9—11) Emergency Foreshore protection jobs. Both were also convicted of making false statements with respect to the three stabilization projects (Counts 32, 37, 43). Ford and his company each received the maximum fine of $40,000—$1,000 for each mail fraud count and $10,000 for each false statement count—and Kent Ford was also sentenced to concurrent suspended three-year prison terms on each count. Neither Ford nor the company appeals.

Alois Luhr and Luhr Bros. were each convicted of twenty-eight mail fraud counts relating to the three Foreshore jobs (Counts 2—4, 5—8, 9—11) and the Hadden-Ft. De Russy job (Counts 13—30) and of two counts of making false statements on bids submitted on the Southwest Pass job (Count 48) and on the Hadden-Ft. DeRussy job (Count 51). Luhr Bros. and Alois Luhr were each assessed the maximum fine, $48,000, and Alois Luhr also receivec concurrent three-year suspended sentences.

Mack Mathis and Bertucci were each convicted of the ten mail fraud counts (Counts 2—11) relating to the Emergency Foreshore jobs and four false statement counts relating to bids submitted on the Foreshore jobs (Counts 31, 36, 42) and on the Southwest Pass job (Count 47). Again, both received the maximum fines and Mathis was given concurrent three-year suspended sentences.

Charles L. Rodgers was found guilty on the same twenty-eight mail fraud counts of which Luhr and Luhr Bros. were convicted and on three false statement counts relating to bids on the Foreshore jobs (Counts 33, 38, 44). He was assessed concurrent three-year suspended sentences and fined $14,500—$250 for each mail fraud count and $2,500 for each false statement count.

I. MAIL FRAUD

[1,2] "The mail fraud statute, 18 U.S.C. §1341, condemns any scheme to defraud in which the mails are used." *United States v. Kreimer,* 609 F.2d 126, 128 (5th Cir. 1980). In order to convict of mail fraud, the prosecution must establish beyond a reasonable doubt three elements: "(1) defendants' participation in a 'scheme or artifice to defraud,' . . .; (2) use of the mails 'for the purpose of executing the scheme,'" *United States v. Knight,* 607 F.2d 1172, 1175 (5th Cir. 1979) (citations omitted); *e.g., United States v. Zicree,* 605 F.2d 1381, 1384 (5th Cir. 1979), *cert. denied,*—U.S.—, 100 S.Ct. 1656, 64 L.Ed.2d 242 (1980). On appeal defendants challenge the sufficiency of the evidence of all three elements. They assert that the proof at trial established not the one scheme to defraud that was charged in the indictment but rather multiple schemes; that the evidence did not support the jury's conclusion that each defendant participated in the scheme; and that the mailings upon which the mail fraud charges were brought were made after the scheme had ended and therefore were not "caused" by the scheme or "for the purpose" of its execution.

Our task on review is to determine "'whether the jury could reasonably, logically, and legally infer from the evidence presented that [the defendants were] guilty beyond a reasonable doubt. . . . Put another way, could the jury reasonably find that the evidence was inconsistent with every hypothesis of innocence?'" *United States v. Habel,* 613 F.2d 1321, 1324 (5th Cir. 1980) [*quoting United States v. Littrell,* 574 F.2d 828, 832 & n. 3 (5th Cir. 1978)]. Of course, in making this determination we consider the evidence in the light most favorable to the government with all reasonable inferences drawn in support of the verdict. *Hamling v. United States,* 418 U.S. 87,

124, 94 S.Ct. 2887, 2911, 41 L.Ed.2d 590 (1974); *Glasser v. United States,* 315 U.S. 60, 80, 62 S.Ct. 457, 469, 86 L.Ed. 680 (1942); *United States v. Habel, supra,* 613 F.2d at 1324; *United States v. Wentland,* 582 F.2d 1022, 1026 (5th Cir. 1978), *cert. denied,* 439 U.S. 1133, 99 S.Ct. 1056, 59 L.Ed.2d 96 (1979).

We conclude that the government met its burden of proof and the jury properly exercised its role. The convictions, therefore, must stand.

A. *Scheme or Schemes*

[3] Relying upon the applicability of conspiracy law principles to mail fraud prosecutions, *see United States v. Freeman,* 619 F.2d 1112, 1123 (5th Cir. 1980); *United States v. Toney,* 598 F.2d 1349, 1355 (5th Cir. 1979), *cert. denied,*—U.S.—, 100 S.Ct. 706, 62 L.Ed.2d 670 (1980); *United States v. Krohn,* 573 F.2d 1382, 1386 (10th Cir.), *cert. denied,* 436 U.S. 949, 98 S.Ct. 2857, 56 L.Ed.2d 792 (1978); *United States v. AMREP Corp.,* 560 F.2d 539, 545 (2d Cir. 1977), *cert. denied,* 434 U.S. 1015, 98 S.Ct. 731, 54 L.Ed.2d 759 (1978); *United States v. Perkal,* 530 F.2d 604, 606 (4th Cir.), *cert. denied,* 429 U.S. 821, 97 S.Ct. 70, 50 L.Ed.2d 82 (1976); *United States v. Cohen,* 516 F.2d 1358, 1364 (8th Cir. 1975); *United States v. Wilson,* 506 F.2d 1252, 1257 (7th Cir. 1974); *United States v. Joyce,* 499 F.2d 9, 16—17 (7th Cir.), *cert. denied,* 419 U.S. 1031, 95 S.Ct. 512, 42 L.Ed.2d 306 (1974), defendants contend that the evidence adduced at trial indicated the existence of multiple, isolated schemes and not the single scheme charged in the indictment. Accordingly, appellants urge that they suffered from a prejudicial "variance" between the indictment and proof at trial within the doctrine of *Kotteakos v. United States,* 328 U.S. 750, 772—73, 66 S.Ct. 1239, 1251—1252, 90 L.Ed. 1557 (1945). The jury properly could have concluded that the defendants were

involved in several and not one scheme to defraud, *United States v. Thomas,* 586 F.2d 123, 132 (9th Cir. 1978); *United States v. Becker,* 569 F.2d 951, 961 (5th Cir.), *cert. denied,* 439 U.S. 865, 1048, 99 S.Ct. 188, 726, 58 L.Ed.2d 174 (1978); *United States v. Rodriguez,* 509 F.2d 1342, 1348 (5th Cir. 1975). However, it did not.

The present case is not one on which the indictment itself charged several criminal agreements. *See United States v. Bowline,* 593 F.2d 944, 946 (10th Cir. 1979). Neither is it one in which no evidence was presented that would indicate a common criminal plan or agreement. *See United States v. Fuel,* 583 F.2d 978, 981 (8th Cir. 1978), *cert. denied,* 439 U.S. 1127, 99 S.Ct. 1044, 59 L.Ed.2d 88 (1979). Rather, the indictment charged a scheme to defraud that continued from 1964 to 1978. Moreover, the evidence clearly supported the conclusion of a single scheme with a common goal, operations carried out in virtually identical manner, and an overlapping of participants. *United States v. Becker, supra,* 569 F.2d at 960. The presence of these factors is more than sufficient to refute defendants' argument of a prejudicial variance.

The evidence presented at trial indicated a long-running scheme designed to circumvent competitive bidding procedures of the Corps of Engineers[10] by "arranging" bids in order to allocate the river construction work. The government's principal witnesses were four river contractors[11] who testified in detail regarding pre-bid allocation

[10]*See* U.S.C. §§2303(a), 2304; Armed Services Procurement Regulation ¶ 1—115, *reprinted in* 32 C.F.R. at 1:14 (1979); 33 C.F.R. §210 (1979).

[11]Participant in the scheme who testified at trial were Bart Tully, president of the Patton-Tully Transportation Co. of Memphis, Tennessee; Wallace McGeorge and Don Boiling of Pine Bluff Sand & Gravel Co. of Pine Bluff, Arkansas; and John T. Massman of Massman Construction Co. and Pensacola Construction Co. of the Kansas City area.

meetings over a period of years and in a number of cities including Omaha, Kansas City, St. Louis, Memphis, Vicksburg, and New Orleans. The operation of the scheme remained consistent over the years; through face-to-face meetings or telephone conversations the river contractors would collectively agree on who would be awarded the Corps jobs. The other co-schemers were then given prices "to clear" or "to protect" and either submitted complementary bids or did not bid at all. The common goal, to allocate Corps of Engineers river construction work, also remained constant.

Participants in individual aspects of the scheme over the years varied to some extent. Overall, however, there remained a high level of commonality. Defendant Luhr was placed at the center of the scheme from beginning to end and throughout the geographical area involved in the case. The government's first witness, Mr. Tully, testified that Luhr participated in allocation meetings in Kansas City in 1964, in Kansas City and Omaha in 1975 and 1976, in Memphis in 1973, and in New Orleans in 1976. According to Tully, Rodgers also attended meetings in Kansas City and New Orleans in 1976. Similarly, defendant Mathis was involved in allocation discussions in Memphis, Vicksburg, and New Orleans.

Defendants also assert that even if the evidence was sufficient to support a finding of one scheme, because the question was for the jury, *see United States v. Becker, supra,* 569 F.2d at 961; *United States v. Rodriguez, supra,* 509 F.2d at 1348, the court committed reversible error in refusing to charge the jury specifically on the possibility of finding multiple schemes. We disagree. While such an instruction may be "good" practice, *United States v. Levine,* 569 F.2d 1175, 1178 n.6 (1st Cir.), *cert. denied,* 436 U.S. 928, 98 S.Ct. 2824, 56 L.Ed.2d 771 (1978), prior decisions of this Court in no way require a finding of

reversible error when such a charge is not given. In charging the jury the court carefully instructed that no individual could be found guilty of mail fraud unless the government proved beyond a reasonable doubt that he "knowingly and willfully devised or intended to devise or joined a scheme to defraud *substantially the same as the one alleged in the indictment.*" (Emphasis added). As stated by the Court of Appeals for the Tenth Circuit when faced with the precise question in *United States v. Watson,* 594 F.2d 1330, 1340 (10th Cir. 1979), *cert. denied,* 444 U.S. 840, 100 S.Ct. 78, 62 L.Ed.2d 51 (1980), "[w]e feel that the instructions as a whole adequately covered the question . . . [I]t was not error to refuse the requested instruction concerning multiple conspiracies." *See also United States v. Freeman, supra* at 1118.

B. *Individual Participation in the Scheme*[12]

i. Luhr and Luhr Bros.

[4-8] Defendants Luhr and his company argue that even though evidence of participation in the scheme in earlier years may be overwhelming, they cannot be convicted of mail fraud regarding the 1976 New Orleans Corps district Emergency Foreshore jobs or the Hadden-Ft. DeRussy job. The argument is meritless. Luhr's active participation in the scheme from the beginning is amply demonstrated by the record. That alone would be sufficient to sustain the mail fraud convictions against him and Luhr Bros. If the scheme is accountable for the mailings for which Luhr is charged, so long as Luhr retains membership in the scheme his conviction is not proscribed. It is "well settled in this circuit" that co-schemers are jointly responsible for each other's acts in furtherance of the scheme. *United*

[12]Defendant Rodgers does not challenge the sufficiency of the evidence of his participation in the scheme.

States v. Toney, supra, 598 F.2d at 1355; *see United States v. AMREP Corp., supra,* 560 F.2d at 545;[13] *United States v. Cohen, supra* 516 F.2d at 1364;[14] *United States v. Wilson, supra,* 506 F.2d at 1257;[15] *United States v. Joyce, supra,* 499 F.2d at 16. The record, however, affirmatively demonstrates Luhr's participation in the division of the Foreshore and Hadden-Ft. DeRussy jobs. Witness McGeorge testified to Luhr's involvement in arranging the allocation of the Foreshore jobs and Mr. Tully and Mr. Massman both testified that Luhr participated in a meeting in Vicksburg to discuss various jobs, including Hadden-Ft. DeRussy. The job was allocated to Massman and he stated that Luhr submitted a complementary bid.

ii Mathis and Bertucci Co.

Mathis admits that he was present at the comprehensive allocation meeting for 1973 held in Memphis and he concedes that the issue of his participation in the meeting or in the arrangements achieveed at the meeting was for the jury to decide. Similarly, the participation of Mathis in attempts to allocate the Southwest Pass job is not seriously in dispute. Mr. Tully and Mr. Boling both testified that Mathis attended an allocation meeting for that job and argued vigorously that his Bertucci Co. was entitled to the

[13] "So long as a transaction is within the general scope of a scheme on which all defendants had embarked, a defendant not directly connected with a particular fraudulent act is nonetheless responsible therefor if it was of the kind as to which all parties had agreed." 560 F.2d at 545.

[14] "An individual participant in a mail fraud scheme will be held liable for the acts of his agents and co-schemers that are within the general scope of the scheme (citation omitted) unless as in a conspiracy, he undertakes some affirmative act of withdrawal." 516 F.2d at 1364.

[15] "In a prosecution for mail fraud, once agreement to a scheme has been adequately is responsible for the acts and declarations of another party in furtherance of the common scheme . . ." 506 F.2d at 1257.

entire contract. Nevertheless, he urges that his convictions for mail fraud in connection with the 1976 Foreshore jobs are not supportable. As with Luhr, absent evidence that Mathis withdrew from the scheme, no additional evidence is required to support his conviction of mail fraud on the Foreshore jobs. But also as with Luhr, independent evidence supports Mathis' mail fraud convictions. Witness McGeorge place Mathis in Mr. Ford's room where the allocation of the Foreshore jobs was worked out. Moreover, Mr. Tully testified that co-schemer Ford had indicated the involvement of Mathis in the decision on the Foreshore jobs, *see United States v. Freeman, supra,* at 1123, and Bertucci Co. did obtain part of the Foreshore work.[16]

C *Relationship of the Scheme and the Mailings*

The mailings charged as the basis of the mail fraud counts were sent by the Corps of Engineers to contractors who obtained the allocated work. These mailings were of two types: "notices to proceed," sent to instruct a contractor to commence construction on a project; and checks in payment for work being completed. Luhr argues at great length that these mailings, as a matter of law, were not sufficiently related to the scheme to defraud in order support the convictions and, further, that the scheme did not "cause" those mailings. Luhr's contentions are misplaced.

[16]Mathis also contends that he was prejudiced by the admission against him of evidence conerning allocation of the Foreshore jobs and, therefore, the court erred in denying his motions for severance and new trial. However, Mathis' participation in the general scheme and in the division of the Foreshore jobs was established. We perceive no prejudice to Mathis and certainly no abuse of discretion in the denial of his motions.

The crux of Luhr's argument appears to be that the scheme to defraud encompassed only the allocation of Corps construction projects. According to Luhr, because the mailings were based on "acts of contract performance" in accordance with contract specifications, those mailings were not a proper basis for mail fraud prosecution.

[9, 10] There is no requirement of "but for" relationship between use of the mails and execution of the scheme to defraud in order for a mailing to be "in furtherance" of the scheme. *United States v. Knight, supra,* 607 F.2d at 1175; *United States v. Buchanan,* 544 F.2d 1322, 1325 (5th Cir.), *cert. denied,* 432 U.S. 907, 97 S.Ct. 2953, 53 L.Ed.2d 1080 (1977). As this Court stated in *United States v. Knight,*

> It is well settled that use of the mails will support a mail fraud conviction if it is "incident to an essential part of the scheme." *Pereira v. United States* [347 U.S. 1, 8, 74 S.Ct. 358, 362, 98 L.Ed. 435 (1954)]; *United States v. Shryock,* 537 F.2d 207, 209 (5th Cir. 1976), *cert. denied,* 429 U.S. 1100, 97 S.Ct. 1123, 51 L.Ed.2d 549 (1977); *United States v. Shepherd,* 511 F.2d 119, 122 (5th Cir. 1975). The mail must be used *"'in employing the scheme however incidental the mailings may be.'" United States v. Ashdown, 509 F.2d 793, 799 (5th Cir.), cert. denied,* 423 U.S. 829, 96 S.Ct. 48, 46 L.Ed.2d 47 (1975), *quoting United States v. Schaefer,* 299 F.2d 625, 630 (7th Cir. 1962) (emphasis in *Schaefer*).

607 F.2d at 1175.

[11] It is true that the scheme to defraud did not concern the performance of the contract work itself. Rather the scheme primarily involved the allocation of the contractors to perform that work. Nevertheless, the scheme defrauded the government of its right to depend upon the

competitive process to allocate the jobs and to set the cost of those jobs. The scheme would have been meaningless, incomplete, and futile without final award and payment which were accomplished through the mail. Clearly, the mails were used "in furtherance" of the scheme.[17]

[17]The determination that the mailings were closely rough related to the scheme to be "in furtherance" of its execution all but disposes of Luhr's contention that performance of the work rather than the members of the scheme "caused" the use of the mails. Luhr's brief itself quotes Supreme Court authority sufficient to lay the contention to rest.

> [O]ne "causes" the mails to be used where he "does an act with knowledge that the use of the mails will follow in the ordinary course of business, or where such use can reasonably be foreseen, even though not actually intended . . ."

United States v. Maze, 414 U.S. 395, 399, 94 S.Ct. 645, 648, 38 L.Ed.2d 603 (1974) [*quoting Pereira v. United States,* 347 U.S. 1, 8—9, 74 S.Ct. 358, 362—363, 98 L.Ed. 435 (1954)]; *United States v. Johnston,* 547 F.2d 282, 284 (5th Cir.), *cert. denied,* 431 U.S. 942, 97 S.Ct. 2660, 53 L.Ed.2d 261 (1977). Use of the mails in the ordinary course of business of the Corps of Engineers reasonably could hve been anticipated by the co-schemers.

Defendant Rodgers urges somewhat confusingly that the mail fraud convictions must be reversed because, to defendants' prejudice, the government unnecessarily "piled" the mail fraud counts on top of an adequately alleged antitrust charge. As demonstrated above, the mail fraud convictions were sufficiently proved. Moreover, bid rigging schemes can be prosecuted simultaneously as Sherman Act and mail fraud violations. *See United States v. Azzarelli Construction Co.,* 612 F.2d 292, 298 (7th Cir. 1979), *cert. denied,*—U.S.—, 100 S.Ct. 3010, 65 L.Ed.2d—(1980); *United States v. Brighton Building & Maintenance Co.,* 435 F.Supp. 222, 226, 229 (N.D.Ill.1977), *aff'd* 598 F.2d 1101 (7th Cir. 1979), *cert. denied,* 444 U.S. 840, 100 S.Ct. 79, 62 L.Ed.2d 52 (1980). Even if identifiable prejudice would have resulted from such joint prosecution, in the present case the Sherman Act count was severed and defendants were tried and convicted only of mail fraud and of making false statements. Until defendants have been convicted of both mail fraud and antitrust violations, it is difficult to ascertain how they can claim to have suffered any harm.

II. FALSE STATEMENTS

[12] On each bid submitted to the Corps of Engineers on river construction work, the bidder makes certain certifications. Among the certificates on the bids submitted by scheme members was the following:

> The prices in this bid have been arrived at independently, without consultation, communication, or agreement, for the purpose of restricting competition, as to any matter relating to such prices with any other bidder or with any competitor.[18]

[13] Mathis and Luhr contend that because of an allegedly misplaced comma following "agreement," the certification quoted above literally meant not that the bid was independently made in order to protect competition but that "the prices in this bid have been independently arrived at for the purpose of restricting competition . . ." Accordingly, although defendants admit making the statement, they contend that since the statement was not literally false it cannot serve to support the false statement convictions. Despite defendants' novel contention, the certification "fairly read," *United States v. Lange, supra,* 528 F.2d at 1288, stated that the bids were entered independently and not collusively. That statement was false and the defendants knew it.[19]

[18]The district court properly instructed the jury that in order to convict any defendant of making a false statement in violation of 18 U.S.C. §1001, the burden rested upon the government to prove beyond a reasonable doubt that the defendant knowingly made a false statement on a matter within the jurisdiction of a federal agency or department, that the false statement related to a material matter, and that the defendant acted willfully with knowledge of the falsity of the statement. *See United States v. Lange,* 528 F.2d 1280, 1287 (5th Cir. 1976); *United States v. Smith,* 523 F.2d 771, 779 n.15 (5th Cir. 1975), *cert. denied,* 429 U.S. 817, 97 S.Ct. 59, 50 L.Ed.2d 76 (1976).

[19]Luhr and Mathis and their companies also challenge the sufficiency of the evidence demonstrating that they submitted collusive bids.

III. OTHER CONTENTIONS

A. *Prosecutorial Argument*

[14] During her closing argument to the jury, one of the government attorneys referred to the mix-up between the co-schemers that occurred in relation to the Southwest Pass job. *See* note 19, *supra*. Although participants in the allocation meeting thought that they had reached an agreement that defendant Luhr and Mr. Tully would get the job. Mr. Rodgers apparently misunderstood and independently bid competitively on the project. His bid was nearly $500,000 below Luhr's and Rodgers' firm won the job. The prosecution focused on this fact to argue that the

Luhr's false statement convictions related to bids submitted on the Hadden-Ft. DeRussy and Southwest Pass jobs. Evidence presented at trial indicated that Luhr attended a contractors' meeting in Vicksburg in June 1976 at which the allocation of the Hadden-Ft. DeRussy job, among others, was discussed. The job was allocated to Mr. Massman's Pensacola Construction Co. Massman stated that Luhr submitted a complementary bid. The meeting for the allocation of the Southwest Pass job was held in Luhr's hotel room in New Orleans. According to Mr. Tully and Mr. Boling, Luhr and several others argued for the job and the tentative agreement was that the work be awarded to Mr. Luhr and Mr. Tully. Defendant Rodgers, however, independently bid the Southwest Pass job—and won it. Later, Rodgers called Mr. Boling and was told that the job had been allocated to Luhr and Tully. Rodgers spoke with Tully and apologized and pledged to remedy the problem. Both Mr. Tully's company and Mr. Luhr's received subcontracted work on the job. The evidence supports Luhr's false statement convictions.

As noted above, Mathis, too, was a party to the agreement thought by all of the participants, save Mr. Rodgers, to have been reached on the Southwest Pass job. Moreover, Mathis' participation on the Foreshore jobs was also discussed above in connection with the mail fraud counts. *See* note 16, *supra* and accompanying text. The evidence amply supports the jury's conclusion that, on the three Foreshore jobs and the Southwest Pass job, Mathis and Bertucci Co. submitted collusive bids.

government had indeed been defrauded of money through the operation of the scheme.

Defendant Rodgers asserts that the argument was prejudicial and contrary to the evidence. We disagree. The trial court correctly overruled defense objections to the prosecutor's observations because the argument was a reasonable inference drawn from the evidence.

B. *Access to Witness*

[15] Defendants also urge that they were denied their right to fair trial because their trial preparation was hindered due to the governement obstructing access to potential witnesses. The issue arose because prosecutors suggested that Corps of Engineers employees speak with defense lawyers only if Justice Department or Corps lawyers were also present. The district court ordered the Corps to inform employees that if they wished, they were free to talk with the defense. Moreover, the court granted a two month continuance. Defendants interviewed all Corps employees who consented and several were listed as potential defense witnesses.[20]

Obstruction of access to witnesses is serious. However, the actions of the district court ameliorated any possible prejudice to the defendants. *See United States v. Clemones,* 577 F.2d 1247, 1252 (5th Cir. 1978). As in *Clemones,* defendants "have not demonstrated real, substantive impairment of their right to a fair trial." *Id.*

C. Change of Corporate Control

[16] The ownership and control of Bertucci Co. chang-

[20]Since th defendants rested following the prosecution's case, however, no Corps employees testified for defendants at trial.

ed after September 11, 1976. The company asserts that this change in ownership precludes corporate criminal liability for offenses committed before September 1976. The argument lacks merit. Bertucci Co. was incorporated in 1968 in Louisiana and has maintained continuous existence since that time. Under Louisiana law:

> A corporation is an intellectual body; created by law, composed of individuals united under a common name, the members of which succeed each other, so that the body continues always the same, notwithstanding the change of individuals which [sic] compose it, and which for certain purposes, is considered as a natural person.

La.Civ.Code Ann. art. 427; *see* La.Rev. Stat.Ann. §12:41 (B)(2). No authority cited by Bertucci Co. indicates that is should be relieved of the criminal liability imposed upon it by the jury.

AFFIRMED.

APPENDIX "B"
ORDER DENYING REHEARING

United States Court of Appeals

FIFTH CIRCUIT

OFFICE OF THE CLERK

October 10, 1980

TO ALL PARTIES LISTED BELOW:

NO. 79-5381 U.S.A. -vs- CHARLES L. RODGERS, ANTHONY J. BERTUCCI CONSTRUCTION CO., INC., MACK A., ALOIS LUHR AND LUHR BROS. INC. (CR-78-332 "H")

Dear Counsel:

This is to advise that an order has this day been entered denying the petition( ) for rehearing, and no member of the panel nor the Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 10) the petition ( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,
GILBERT F. GANUCHEAU, Clerk
By /s/
Deputy Clerk

cc: Mr. Francis G. Weller
Mr. John R. Martzell
Mr. Bruce Rohde
Mr. J. Mark Manner

APPENDIX "C"
STATUTES

STATUTORY PROVISIONS INVOLVED

18 U.S.C. 1341.

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

18 U.S.C. 1001.

Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry,

shall be fined not more than $10,000 or imprisoned not more than five years, or both.

15 U.S.C. 1.

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by the both said punishments, in the discretion of the court.

18 U.S.C. 1503.

Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any witness, in any court of the United States or before any United States commissioner or other committing magistrate or any grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States commissioner or other committing magistrate, in the discharge of his duty, or injuries any party or witness in his person or property on account of his attending or having attended such court or examination before such officer, commissioner, or other committing magistrate, or on account of his testifying or having testified to any matter pending therein, or injures any such grand or petit juror in his person or property on account of any verdict or indictment assented to by him, or on account of his being or having

been such juror, or injures any such officer, commissioner, or other committing magistrate in his person or property on account of the performance of his official duties, or corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be fined not more than $5,000 or imprisoned not more than five years, or both. June 25, 1948, c.645, 62 Stat. 769.

No. 80-934

In the Supreme Court of the United States

OCTOBER TERM, 1980

ANTHONY J. BERTUCCI CONSTRUCTION CO., INC., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
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v.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners contend that at their trial for mail fraud the district court committed reversible error in refusing to instruct the jury on the possibility of finding multiple schemes to defraud.

1. Following a jury trial in the United States District Court for the Eastern District of Louisiana, petitioners were convicted of mail fraud, in violation of 18 U.S.C. 1341, and of making false material statements with respect to a matter within the jurisdiction of an agency of the United States, in violation of 18 U.S.C. 1001.[1] The court of appeals affirmed (Pet. App. 1a-17a; 624 F. 2d 1303).

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[1]One count charging conspiracy to restrain competition, in violation of Section 1 of the Sherman Act (15 U.S.C. 1), was severed prior to trial. Petitioners Alois Luhr and Luhr Bros. were each convicted of 28 mail fraud and two false statement counts. Each was fined $48,000, and Alois Luhr received concurrent suspended three-year sentences. Petitioners

The evidence, as summarized in the opinion of the court of appeals (Pet. App. 7a-8a), showed that petitioners and their co-defendants were involved in a scheme to allocate bids for river bank stabilization projects awarded by the United States Army Corps of Engineers between 1964 and 1978. Four river contractors testified for the government concerning pre-bid allocation meetings that took place over a period of several years and in a number of different cities. The essential operation of the scheme remained constant. The river contractors would collectively agree on which contractor would be awarded a particular Corps job. The other participants in the scheme would then either submit noncompetitive bids or would not bid at all for the contract. While participants in individual aspects of the scheme varied somewhat over the years, there remained a high level of commonality overall. For example, petitioner Alois Luhr was placed in the center of the scheme during the entire period and throughout the geographical area covered by the scheme, and petitioner Mathis was involved in several allocation discussions in different cities.

2. On appeal, the defendants challenged their convictions for mail fraud, claiming that there was a prejudicial variance between the proof at trial, which the defense asserted established the existence of multiple, isolated schemes to defraud, and the allegations of the indictment, which charged a single fraudulent scheme. The court of appeals rejected this claim (Pet. App. 7a), finding that "the evidence clearly supported the conclusion of a single scheme with a common goal, operations carried out in

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Mack Mathis and Bertucci Construction were each convicted of ten mail fraud and four false statement counts. Each was fined $50,000, and Mathis received concurrent suspended three-year sentences. Two co-defendants, W. Kent Ford and Ford Construction Company, did not appeal their convictions. Another co-defendant, Charles L. Rodgers, has not sought review by this Court of the court of appeals' affirmance of his conviction. Nineteen other co-defendants entered pretrial pleas of guilty or nolo contendere.

virtually identical manner, and an overlapping of participants." In addition, the court rejected the defendants' related contention that the district court erred in declining specifically to instruct the jury on the possibility of finding multiple schemes to defraud (*id.* at 8a-9a). It was sufficient, the court held, that the trial judge had carefully instructed "that no individual could be found guilty of mail fraud unless the government proved beyond a reasonable doubt that he 'knowingly and willfully devised or intended to devise or joined a scheme to defraud substantially the same as the one alleged in the indictment' " (*id.* at 9a; emphasis deleted).[2]

3. Petitioners contend (Pet. 5-6) that the district court should have given a specific instruction with respect to the procedures for determining guilt or innocence if the jury were to find that the evidence established the existence of multiple conspiracies, rather than the single conspiracy that was charged. They claim that the court of appeals' refusal to reverse their convictions for failure to so instruct the jury conflicts with the decisions of the Seventh Circuit in *United States* v. *Varelli*, 407 F. 2d 735 (1969), and the Ninth Circuit in *United States* v. *Eubanks*, 591 F. 2d 513 (1979).

There is no conflict. In *United States* v. *Abraham*, 541 F. 2d 1234, 1238-1239 (7th Cir. 1976), cert. denied, 429 U.S. 1102 (1977), the Seventh Circuit made it clear that the

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[2]The court of appeals also rejected the defendants' claim that their right to a fair trial was violated by the prosecutors' suggestion that Corps of Engineers employees speak with defense lawyers only in the presence of Justice Department or Corps attorneys (Pet. App. 16a). When this situation was called to the attention of the district court, it ordered a two month continuance and directed the Corps to inform its employees of their freedom to talk with defense counsel. During that period, the defense interviewed all Corps employees who consented and listed several employees as potential defense witnesses. The court of appeals concluded that the actions of the district court rectified any possible prejudice to the defense.

failure to instruct on multiple conspiracies does not necessarily amount to reversible error. The Court interpreted *Varelli* as encouraging, but not requiring, a multiple conspiracy instruction when the evidence would permit a finding of either a single conspiracy or multiple conspiracies. The Ninth Circuit in *Eubanks* did not hold that the district court committed reversible error in declining to instruct the jury on multiple conspiracies in a case where the indictment charged a single conspiracy. Rather, after ordering a new trial on other grounds, the court addressed the multiple conspiracy instruction issue to aid the district court on remand, and it declared that the evidence warranted an instruction on the possibility of multiple conspiracies (591 F. 2d at 518).[3] The First, Second, and Tenth Circuits are in accord that the failure of the trial court to instruct on the possibility of finding multiple conspiracies at variance with a single conspiracy alleged in the indictment is not automatic reversible error. *United States* v. *Levine*, 569 F. 2d 1175, 1178 n.6 (1st Cir.), cert. denied, 436 U.S. 928 (1978); *United States* v. *Lam Lek Chong*, 544 F. 2d 58, 67-68 (2d Cir. 1976), cert. denied, 429 U.S. 1101 (1977); *United States* v. *Watson*, 594 F. 2d 1330, 1340 (10th Cir.), cert. denied, 444 U.S. 840 (1979).

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[3]None of the remaining Ninth Circuit decisions cited by petitioners (Pet. 5-6) holds that a failure to give a multiple conspiracy instruction when the evidence is sufficient to prove a single conspiracy constitutes error. *United States* v. *Thomas*, 586 F. 2d 123, 132 (9th Cir. 1978), simply indicated approval of multiple conspiracy instructions given by a trial judge when the evidence warranted such an instruction. *United States* v. *Bracy*, 566 F. 2d 649, 657-658 (9th Cir. 1977), cert. denied, 439 U.S. 818 (1978), held only that the evidence was sufficient to prove the defendants' participation in a single conspiracy. *United States* v. *Griffin*, 464 F. 2d 1352, 1357 (9th Cir.), cert. denied, 409 U.S. 1009 (1972), held that where the government's evidence established the existence of five separate conspiracies instead of the single conspiracy charged, any possible prejudice that may have been caused by the variance was cured by the trial court's instruction that if the jury were to find multiple conspiracies, it could still find the defendants guilty, but only if it considered the evidence against each defendant separately.

Moreover, contrary to petitioners' suggestion (Pet. 5-6), the court of appeals' decision is not inconsistent with *Kotteakos* v. *United States*, 328 U.S. 750 (1946). In that case this Court held that where the evidence admittedly showed eight separate and distinct conspiracies and only a single conspiracy was alleged in the indictment, the variance between the proof at trial and the indictment was not harmless error. In the present case, by contrast, the evidence was ample to prove the single scheme alleged in the indictment (see Pet. App. 7a-8a).[4]

4. Petitioners' argument (Pet. 7-11) that the court of appeals' decision allows "witness intimidation" is frivolous. Whether or not it was improper for the prosecutors to advise Corps employees not to talk to the defendants unless a Corps or Justice Department lawyer was present, the district court effectively remedied any possible harm. It granted a two-month continuance of the trial, and it made it clear to Corps employees that they could talk freely to the defense (see note 2, *supra*). As a result, the defendants "interviewed all Corps employees who consented and several

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[4]The Court in *Kotteakos* noted (328 U.S. at 767-769) that the trial court's instructions compounded the variance problem by treating the evidence as having shown only one conspiracy. But the Court did not affirmatively hold that a district court is required to instruct the jury concerning the possibility of finding multiple conspiracies where, as here, only one conspiracy is charged and the proof is sufficient to establish the existence of that conspiracy.

were listed as potential defense witnesses" (Pet. App. 16a). In these circumstances, the court of appeals correctly concluded that the defendants were not prejudiced.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

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